

orbital slots for DBS assignments to the United States. See NPRM at ¶¶ 51, 52. The auctioning of DBS channels pending such an effort is tantamount to an art auction house auctioning a work by Picasso with the caveat that it may be unique, but it may also be one of an unspecified number of identical copies. Even if a rational buyer decided to participate in such an auction, it would very likely not lead to an informed valuation and an efficiency-enhancing allocation of spectrum resources.

The informed and efficient valuation of DBS resources is also inhibited by the uncertainty over the possibility of service outside the United States. See NPRM at ¶ 24. The right to provide such service could dramatically alter the value of the DBS asset, potentially making rational bidders value western slots as highly as, or even higher than, eastern slots, whereas on the basis of a "domestic service only" assumption the reverse would be the case. Alerting prospective bidders to this uncertainty and saying "caveat emptor," as the NPRM purports to do, does nothing to reduce the uncertainty or remedy the inefficiency that it entails.

VII. SPECTRUM AGGREGATION LIMITATIONS SHOULD ONLY BE IMPOSED ON DBS PERMITTEES THAT ARE, OR ARE AFFILIATED WITH, DOMINANT MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTORS

A. Channel Caps

EchoStar and DirectSat fully subscribe to the Commission's concerns with the profound anti-competitive implications of affiliations between DBS providers and dominant Multi-Channel Video Programming Distributors ("MVPD"s). See NPRM at ¶ 36. As EchoStar's expert, Professor Roger Noll, has testified in the Advanced proceeding, the addition of 27 full-CONUS channels to Tempo's existing 11 full-CONUS assignments would be extremely anti-competitive. Professor Noll's conclusion, and all the anti-competitive effects he identified in connection with the Advanced transaction, obviously remain the same whether Tempo buys the channels from Advanced or at a public auction. An auction cannot rationally be said to enhance efficiency if the bidder that values the spectrum most highly does so because it will facilitate anti-competitive behavior and the reaping of monopoly profits. Accordingly, EchoStar and DirectSat submit that the maximum number of orbital channels that a cable-affiliated MVPD may hold should be no more than 16 channels -- more than enough to replace Primestar's existing Ku-band transponders and sustain Primestar's existing service, which already commands almost one million subscribers.

Proceeding from the justified concern with dominant MVPDs and their affiliates, however, the Commission proposes to impose a 32-channel cap indiscriminately on all DBS permittees,

whether or not they are affiliated with any other MVPD, dominant or otherwise. Such an indiscriminate restriction is unjustified when gauged in any of the possible relevant markets -- either the broader MVPD market or the DBS submarkets. In the MVPD market, a DBS provider that is not affiliated with a dominant MVPD would appear to hold no market power irrespective of the number of DBS channels it controls, in the absence of any aggravating circumstances or case specific reasons to fear anticompetitive behavior, which can only be ascertained on a case-by-case basis. The dominant provider of video programming in virtually every geographic market is the local cable television company. In the DBS full-CONUS submarket (which should properly consist of the three full-CONUS slots plus Primestar's high-power Ku-band offering), a cable-unaffiliated MVPD provider with 32 channels would still control less than 30% of the channel capacity. Such market shares, standing alone and absent aggravating circumstances, should similarly be considered innocuous under antitrust and general competition precedent.^{19/}

Therefore, the Commission should refrain from imposing a 32-channel spectrum cap on DBS permittees that are neither

^{19/} See, e.g., United States v. Eastman Kodak Co., 853 F. Supp. 1454, 1472-73 (W.D.N.Y. 1994), aff'd, 63 F.3d 95 (2d Cir. 1995); Advo, Inc. v. Philadelphia Newspapers, 854 F. Supp. 367, 374 (E.D. Pa. 1994), aff'd, 51 F.3d 1191 (3d Cir. 1995).

dominant nor affiliated with a dominant MVPD. Where non-dominant MVPDs wish to merge their DBS channels by a transaction that will not result in a dominant provider of services, the market should be allowed to decide the most efficient allocation of spectrum resources. The imposition of artificial spectrum caps on non-dominant providers would only be second-guessing the competitive marketplace. Indeed, the market may decide for example, that there is room for three profitable DBS providers. In such a case, a 32-channel limitation would arbitrarily dictate a 4-provider market. Such a limitation would prevent a nonviable fourth DBS competitor from exiting the market by selling its business to another DBS provider, or from merging with another provider. The Commission should review combinations involving DBS permittees on a case-by-case basis and only should intervene where such combinations would result in market dominance.^{20/}

B. Orbital Slot Caps

With respect to the number of orbital locations where a DBS permittee may have assignments, the NPRM proposes an

^{20/} See In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48 (rel. Sept. 28, 1994).

one-slot cap only for DBS operators affiliated with another MVPD. NPRM at ¶ 40. Again, however, the one-slot cap should apply only to DBS providers affiliated with dominant MVPDs, as any affiliation with a non-dominant MVPD would not affect the competitive analysis. Like the proposed 32-channel cap, the one-slot restriction would only handicap non-dominant DBS providers: having channels at more than one slot is less advantageous than an one-slot aggregation, since use of split channels would require either two dishes and two LNBS or an actuated dish, in either case at considerable additional expense and inconvenience for the subscriber. The subscriber will have a natural, hard-to-overcome preference for a single unactuated dish. Imposing an one-slot cap on non-dominant DBS operators, for which the only available additional channels may be in a different slot, would be tantamount to further penalizing an already disadvantaged situation.

On the other hand, with respect to DBS operators affiliated with dominant MVPDs, holding channels at more than one slot may be used as a strategy for precluding competition. EchoStar and DirectSat therefore agree with the Commission's proposed one-slot restriction only for such dominant MVPD operators.

C. The Commission Should Reclaim Excess Channels From Dominant-Affiliated MVPD Providers

Based on the same reasons for imposing spectrum caps on dominant MVPD providers, the Commission should not allow a dominant-affiliated operator that acquires control over channels in excess of the caps to choose how to dispose of its excess channels. See NPRM at ¶ 43. If given such a choice, the dominant-affiliated operator will tend to act on its incentive to place those channels with anyone other than an entity that could become a serious competitor in the MVPD marketplace or that can use those channels efficiently.^{21/} Instead, the Commission should condition any such transaction on the reclamation of excess channels for later redistribution. The dominant-affiliated operator would, of course, be free not to acquire more channels (e.g., not to bid for Advanced's assignments) and thus avoid the surrender of channels to the Commission.

D. EchoStar And DirectSat Should Not Be Held To Violate Any Channel Or Slot Caps

EchoStar's and DirectSat's current situation illustrates the excessive breadth of the proposed spectrum caps

^{21/} The concern with such anti-competitive behavior is particularly acute for EchoStar and DirectSat: they fear that Tempo will be extremely disinclined to negotiate in good faith with them about assigning Tempo's current 119° W.L. channels should Tempo still be interested in the 110° W.L. slot.

if they are imposed indiscriminately. EchoStar currently has a 40% interest in DBSC and would therefore exceed both the 32 channel and single-location caps. EchoStar does not believe that precluding these affiliations is intended by the Commission. At an absolute minimum, if the Commission decides to impose spectrum caps on non-dominant operations, it should grandfather any existing spectrum aggregations which would otherwise be in violation of the caps.^{22/} EchoStar clearly is the classic example of a nascent entrepreneur whose growth should be encouraged, not curbed, by the Commission.

EchoStar also has an extremely modest operation as a C-band program packager, serving 75,000 subscribers out of millions of C-band subscribers -- a minuscule share of a small submarket which is itself a small segment of the MVPD market. Seeing an anti-competitive potential in affiliations such as this would penalize the smallest entrants into the MVPD market. Clearly, the Commission should not attach any regulatory significance to such affiliations.

E. The Full-CONUS DBS Sub-Market Does Not Include the 61.5° W.L. Location

^{22/} See NPRM at ¶ 50 (NPRM notes that, the Commission's knowledge; "none of the affiliations among current DBS permittees runs afoul of the proposed limitation even under this attribution rule"). Of course, the interest of EchoStar Communications Corporation in DBSC is a matter of record with the Commission.

If the Commission were nonetheless to impose indiscriminate spectrum caps on all DBS providers, the 61.5° W.L. orbital location should not be counted against these caps. This orbital location does not qualify as a full-CONUS DBS slot either from an engineering or from a marketing standpoint. Indeed, a substantial part of the western United States, including the population centers of Los Angeles, San Francisco, Portland and Seattle would receive DBS service from that location at elevation angles of less than 20 degrees. As a result of the low look angles and the concomitant increase in rain attenuation, a significant portion of the population in this part of the country will be incapable of receiving DBS service from 61.5° W.L. This will in turn clearly inhibit the marketing of the service from this location. It is almost certain that consumers in the affected parts of the country will consider service from 61.5° W.L. an inadequate substitute for service from the other three eastern slots.

Accordingly, the DBS full-CONUS submarket cannot be said to include 61.5° W.L. At most, the submarket consists of DBS locations 101, 110 and 119° W.L. plus Primestar's high-power Ku-band full-CONUS service. If the Commission were to impose a

spectrum cap on full-CONUS channels, it should consider only these locations.

VIII.THE COMMISSION SHOULD IMPOSE STRICTER CONDUCT RULES ON CABLE OPERATORS AND PROGRAMMERS

Even more important than the structural safeguards proposed by the Commission are appropriate restrictions on anti-competitive conduct by dominant MVPD provider and programmers. EchoStar and DirectSat support the Commission's concerns in this area and urge it to impose direly needed restrictions on anti-competitive conduct against DBS providers. Shelving the Commission's inquiries or deferring action for a future rulemaking would be a decisive defeat in the Commission's battle to introduce competition on an equal footing in the MVPD marketplace.

A. The Prohibition On Discrimination Should Extend To Unaffiliated Programmers

The Commission's program access rules are inadequate to curb anti-competitive behavior in at least two fundamental respects. First, they restrict only the dealings of cable-affiliated programmers, thus allowing cable operators to circumvent the rules by channeling programming into unaffiliated

programmers and freely entering into exclusive arrangements with them. However, economic analysis has demonstrated that the threat of anti-competitive conduct by cable operators in the area of programming access does not arise from the affiliation with programmers, but rather from the operators' monopsony power, which they have vis-à-vis all programmers, whether cable-affiliated or not. In a recently published article, Professor David Waterman concludes that both integrated and unintegrated program suppliers have engaged in the same anticompetitive behavior in question, i.e. foreclosure, and that "the basic source of the behavior must be horizontal market power at the cable system level, or at the Multiple Cable System Operator (MSO) level, in the market for programming." David Waterman, "Vertical Integration and Program Access in the Cable Television Industry," 47 Fed. Com. L.J. 511, 514 (April 1995). The program access rules, as they are predicated on such affiliations, leave cable operators free to exercise their monopsony power with respect to unaffiliated programmers and to compel such programmers to discriminate against DBS providers. Even worse, they potentially leave cable operators free to circumvent the program access rules by channeling programming into unaffiliated programmers and freely entering into exclusive arrangements with them.

To remedy this problem, the Commission should extend its program access rules and apply the prohibition on discrimination to unaffiliated programmers as well. The Commission has ample authority to do so under the 1992 Cable Act. The Act specifies that the purpose of the program access rules is, among other things, to increase competition and diversity in the MVPD market. See 47 U.S.C. § 548(a). To that end, the Act enunciates a broad prohibition making it unlawful for cable operators and affiliated programmers to:

engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. § 548(b).

The Act also requires the Commission to promulgate regulations and prescribes their "minimum contents." See 47 U.S.C. § 548(c)(2). Of course, the Commission is not only authorized, but required to go beyond the prescribed minimum content to effectuate the prohibition of 47 U.S.C. § 548(b). In other words, where, as here, Congress has instructed the Commission to prohibit discrimination by affiliated programming vendors at a minimum, the Commission may clearly go beyond that minimum and curb discrimination even in the absence of

affiliation, if necessary to stop the "unfair methods of competition" condemned by the Act.

B. Cable-Affiliated Programmers Must Bear The Burden Of Proving Cost Differentials Or Economies Of Scale

Second, EchoStar and DirectSat recognize, of course, that the 1992 Cable Act bars the Commission from prohibiting programming price differentials based on differences in cost or economies of scale, see 47 U.S.C. § 548(c)(2)(B). However, the second fundamental problem with the Commission's program access rules is that they are not structured so as to prevent affiliated programmers from invoking non-existent cost differentials or economies of scale to justify higher rates for DBS providers than cable operators. Because of this deficiency, cable operators can avail themselves of what has in effect become a huge "loophole" in the rules and can invoke cost differentials that there is no cost-effective or feasible way of probing.

In fact, any cost differentials invoked by the cable industry to justify higher rates to satellite distributors are a complete myth. In fact, Mr. Ergen's Verified Statement shows that the cost of sale, delivery, or transmission of programming for satellite distribution typically is lower, not higher, than

the cost incurred by programmers in their dealings with cable telecom systems.

In a typical transaction between a cable operator and a programming vendor, the vendor incurs the cost of uplinking the signal and downlinking it to a large number of cable headends. It also incurs the cost of auditing every cable headend. Further, it often incurs substantial piracy costs.

On the other hand, in a typical transaction between a programming vendor and a satellite distributor, such as EchoStar, the vendor incurs the cost of uplinking and downlinking the signal to only one location -- the satellite operator's uplink facility. In fact, the only reason why the vendor incurs the cost of using a satellite in the distribution of its programmers is the need to reach geographically disperse cable operators. A DBS provider can obtain programming by "piggy-backing" on the satellite transmission that is necessary for the cable operators, at no incremental cost to the programming vendor. But for the point-to-multipoint needs of cable operators, the vendor could transmit its signal to a DBS provider by a cheaper, point-to-point means -- e.g., fiber. Furthermore, with DBS providers the programming vendor need audit only one site as opposed to many cable headends. Moreover, piracy is a factor in most cable rates, but need not be a cost factor in EchoStar's and

DirectSat's digital compressed signal. Mr. Ergen also opines that there can be no significant economies of scale attaching to the number of subscribers served by a programmer. The sale of programming to cable operators entails substantial diseconomies of scale, as it requires service to several headends as opposed to one centralized DBS facility.

Accordingly, in the typical case, a cable programmer should not be able to meet the exceptions to the anti-discrimination obligations of cost differentials and economies of scale. However, because such cost information is in the exclusive custody of programmers, and because the Commission has not shown its resolve in investigating whether these cost differences or economies of scale invoked by cable programmers are real, program vendors are left virtually free to engage in discriminatory pricing against DBS providers.

To remedy this predicament, the Commission must provide for an enforcement and investigation mechanism that will not allow cable operators and programmers to get away with phantom cost differentials and scale economies. For example, the Commission should specify that the burden of showing cost differences or economies of scale lies squarely on the programmer. The reality of programmer-distributor dealings, whereby the vendor typically incurs lower costs in dealing with

satellite distributors than in transactions with cable operators, and has the best available information about its costs, justifies this allocation of the burden of persuasion. The rules should also specify that, where the programming vendor has to transmit its signal to more than three headends, there is an irrebuttable presumption that the programmers costs in transactions with cable systems are not lower than the cost of dealing with satellite distributors. The Commission's resolve in curbing anti-competitive behavior in this area may be the make-or-break for the DBS industry as a competitor to cable, e.g., programming costs will account for a substantial portion of all of EchoStar's costs.

C. The Proposed Restrictions On Exclusive Distribution Arrangements Should Only Prohibit The Grant Of Exclusivity To Dominant MVPDs

EchoStar and DirectSat support the extension of the Tempo II conditions to all DBS operators affiliated with dominant MVPDs. For the reasons developed above, however, EchoStar and DirectSat believe that applying those restrictions across the board on all DBS operators affiliated with non-dominant MVPDs, see NPRM ¶ 51, would be unnecessary and unduly restrictive; it would deprive joint ventures between DBS operators and other MVPDs of the possible efficiencies of an exclusive arrangement

even where no anti-competitive dangers loom. Likewise the proposed prohibition on grants of exclusive rights to any MVPD (presumably, even an MDS or LMDS operator), see NPRM § 56, sweeps too broadly. The prohibition should only extend to agreements with dominant MVPDs, and any arrangements with non-dominant MVPDs should be gauged on a case-by-case basis.

D. The Commission Should Impose Restrictions To Prevent Anti-Competitive Foreclosure By Cable Affiliates From The Provision Of Wholesale HITS-Type Service To Cable Systems

EchoStar and DirectSat also share the Commission's concern with vertical foreclosure in the area of wholesale distribution of programming to cable systems and other terrestrial MVPDs. EchoStar and DirectSat are intensely interested in providing wholesale services. As the NPRM recognizes (NPRM ¶ 61), such service offers a unique opportunity to generate two revenue streams by using the same facilities. EchoStar and DirectSat lack, however, the opportunity to compete fairly against TCI or Primestar.

First, EchoStar fears that, even if an independent DBS provider is more efficient and can offer lower rates or a more competitive package to cable systems, cable systems will inefficiently favor the offering of a cable-affiliated provider.

To prevent such inefficient foreclosure, the Commission should: clarify that the prohibition on unfair practices contained in the cable rules, 47 C.F.R. § 76.1001, applies to DBS as well; i.e., prohibit cable operators from choosing wholesale offerings by affiliated satellite providers when a non-affiliated provider offers a lower price and similar non-price terms and conditions, and, to effect this prohibition, require disclosure of contracts between cable operators and affiliated satellite providers.

Second, EchoStar and DirectSat are concerned that the contracts between programmers (whether affiliated or not) and cable operators are less restrictive with respect to the provision of HITS-type service than the contracts that EchoStar and DirectSat have been able to secure. As there is no legitimate business reason for such divergence, the Commission should expand and clarify its program access rules to make clear that all programmers, whether affiliated with cable operators or not, may not discriminate as between cable-affiliated and independent DBS providers regarding the terms and restrictions applicable to the offering of wholesale capacity to terrestrial MVPDs.

IX. SERVICE RULES - MISCELLANEOUS OTHER ISSUES

EchoStar and DirectSat applaud the proposed extension of the DBS license term to 10 years, see NPRM ¶ 71, and also support the discontinuance of the pairing policy for future eastern and western assignments.

X. CONCLUSION


For the foregoing reasons, EchoStar and DirectSat respectfully request that the Commission adopt the recommendations made herein.

Respectfully submitted

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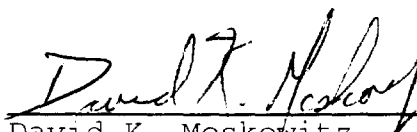
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DECLARATION

I, David K. Moskowitz, declare under penalty of perjury that I have read the foregoing and that the statements made therein are true and correct.

A handwritten signature in black ink, appearing to read "David K. Moskowitz", is written over a horizontal line.

David K. Moskowitz
Vice President and General
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Directsat Corporation

Dated: November 17, 1995

ENGINEERING CERTIFICATE

I hereby certify that I am the technically qualified person responsible for the engineering information in the foregoing, that I am familiar with Part 25 of the Commission's Rules, that I have either prepared or reviewed the engineering information submitted in the foregoing and that it is complete and accurate to the best of my knowledge.

A handwritten signature in black ink, appearing to read 'Rohan Zaveri', is written over a horizontal line.

Rohan Zaveri
DBS Program Manager
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Dated: November 17, 1995

CERTIFICATE OF SERVICE

I, Pamela S. Strauss, hereby certify that a copy of the foregoing Comments of EchoStar Satellite Corporation and Directsat Corporation was hand-delivered on this 20th day of November, 1995, to the following:

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VERIFIED STATEMENT OF CHARLES W. ERGEN

I, Charles W. Ergen, hereby declare and state as follows:

1. I am Chairman and Chief Executive officer of EchoStar Satellite Corporation ("EchoStar") and DirectSat Corporation ("DirectSat"). I am the controlling shareholder of EchoStar Communications Corporation ("EchoComm"), which is the sole ultimate parent of EchoStar and DirectSat.

2. I was the controlling shareholder of EchoStar when it filed an application with the Federal Communications Commission to build a Direct Broadcast Satellite ("DBS") system in 1988, and have been the controlling shareholder of EchoStar without interruption since that time. I have held my positions in DirectSat without interruption since DirectSat merged with an EchoComm subsidiary in January 1995.

3. EchoStar commenced construction of the first satellite of its system shortly after receiving eastern orbital and channel assignments in 1992. At that time, EchoStar decided to construct a 16-transponder satellite in reliance on the right to receive five additional channel assignments -- a total of 16 full-CONUS channels -- given EchoStar by the Commission in the 1989 Continental decision. EchoStar would not have built a